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No. 1082

In the Supreme Court of the United States

October Term, 1962

[redacted]

[redacted]

UNITED STATES OF AMERICA

[redacted]

MOTION FOR A STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

[redacted]

BRIEF FOR THE UNITED STATES IN OPPOSITION

[redacted]

[redacted]
Solicitor General,

[redacted]
Assistant Attorney General,

[redacted]
[redacted]

Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1028

BRONNE A. BRUZGO, JR., and ROBERT J. BRUZGO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 19-24) is not reported. The court of appeals wrote no opinion.

JURISDICTION

The orders of the court of appeals, dismissing the appeals for want of jurisdiction, were entered on March 20, 1963 (Pet. 27, 28). The petition for a

writ of certiorari was filed on April 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly dismissed, for lack of jurisdiction, petitioners' appeals from orders denying motions to dismiss an indictment.

STATEMENT

Petitioners were indicted in the Middle District of Pennsylvania for wilful attempts to evade tax by filing false and fraudulent corporate and individual income tax returns. On October 18, 1961, they entered pleas of not guilty, and on November 17, 1961, they filed motions to dismiss the indictment, alleging that it was improperly obtained because two witnesses were before the grand jury at the same time, and because the prosecutors threatened and disparaged a witness in the presence of the grand jury.

After affidavits were filed by the petitioners and the government, after a deposition was taken by order of the court, and after the court examined *in camera* the record of proceedings before the grand jury, the court on January 8, 1963, denied the motions to dismiss, and denied petitioners' related motions to inspect the grand jury minutes and to take the affidavit of each grand juror (Pet. 19-26). Petitioners appealed, and on March 20, 1963, the court of appeals dismissed the appeal of each petitioner on the ground that it lacked jurisdiction, the orders

appealed from not being final reviewable orders (Pet. 27-28).

ARGUMENT

In dismissing petitioners' appeals for lack of jurisdiction, the court below was clearly correct, since an order of a district court denying a motion to dismiss an indictment is not a "final decision" within the meaning of 28 U.S.C. 1291, and is therefore not appealable. See *Atlantic Fishermen's Union* v. *United States*, 197 F. 2d 519, 520 (C.A. 1); *United States* v. *Golden*, 239 F. 2d 877, 878 (C.A. 2); *United States* v. *Foster*, 278 F. 2d 567 (C.A. 2), certiorari denied, 364 U.S. 834; *United States* v. *Tiplitz*, 202 F. 2d 60 (C.A. 3); *Cheretos* v. *United States*, 256 F. 2d 576 (C.A. 6); *Kyle* v. *United States*, 211 F. 2d 912, 914 (C.A. 9). "Final judgment in a criminal case means sentence." *Berman* v. *United States*, 302 U.S. 211, 212. Cf. *Di Bella* v. *United States*, 369 U.S. 121, 126; *Cobbledick* v. *United States*, 309 U.S. 323, 324-325.

Petitioners imply that, if this interlocutory appeal is not allowed, their constitutional rights will be violated, because the Fifth Amendment provides that "No person shall be held to answer * * * unless on a presentment or indictment of a Grand Jury," and yet here, as they contend, there was no proper grand jury proceeding (Pet. 8, 18). But such contentions are not regarded as sufficient justification for piecemeal appeals, when the right in question may, if violated, be vindicated by appeal from the final judg-

ment in the case, *Heike* v. *United States*, 217 U.S. 423, 431-433; *DiBella* v. *United States*, *supra*; *Parr* v. *United States*, 351 U.S. 513, 518. Indeed, the law applicable to this case is so well settled that it may appropriately be said here, as the First Circuit observed in the *Atlantic Fishermen's Union* case, *supra*, 197 F. 2d at 520: "The order of the district court denying the motion to dismiss the indictment was obviously not a 'final decision' * * * and the attempted appeal therefrom was, we think, obviously frivolous."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. DRANT,
Attorneys.

MAY 1963.